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IN THE

Supreme Court of the United States

October Term, 1964.

No. 357

PHILIP CHARLES TESTA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PHILIP CHARLES TESTA, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 9, 1964.

OPINIONS BELOW.

The opinion of the court below (Appendix A, *infra*, pp. 9-11) has not yet been reported. The opinion of the court below on an earlier phase of the case is reported at 326 F. 2d 730.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1964 (Appendix B, *infra*, p. 12). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether a sentence to conditional confinement to enforce the order of a court that a grand jury witness answer questions propounded to him can be adjudged in a proceeding for criminal contempt committed in the presence of the court that is instituted and conducted under Rule 42, F. R. Crim. P.

2. Whether a sentence to conditional confinement can properly be imposed as a punishment for a criminal contempt committed in the presence of the court.

3. Whether a sentence to conditional confinement that was imposed summarily by a judge for a contempt committed in the presence of the court, and that will have extended to 11 months by the time this Court acts on the present petition, exceeds constitutional limitations.

RULE OF CRIMINAL PROCEDURE INVOLVED.

Rule 42, F. R. Crim. P., provides as follows:

Rule 42. Criminal Contempt

(a) Summary Dispositon. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT.

This case is a sequel to No. 774 of the last Term, but presents wholly different questions.

As the record in that case shows, petitioner refused to answer certain questions propounded to him by a grand jury in the Eastern District of Pennsylvania. The United States District Court there directed him to answer, and, upon his continued refusal, the District Judge, proceeding under Rule 42, F. R. Crim. P., sentenced him to remain in confinement until he answered the questions, filing the certificate required by Rule 42(a) for criminal contempts committed in the presence of the court.

On petitioner's appeal, which asserted that no contempt had been committed and which challenged the validity of the order adjudicating the contempt, his conviction was affirmed. *United States v. Testa*, 326 F. 2d 730 (C. A. 3).

Successive applications to the Circuit Justice for bail, the first pending rehearing below, the second pending application for certiorari here, were denied on January 9 and 21, 1964, respectively.

Certiorari was then denied here on February 24, 1964, one Justice dissenting (376 U. S. 931; No. 774, Oct. T. 1963).

Thereafter, on March 17, 1964, the indictment was dismissed by the prosecution; and on April 6, 1964, this Court decided *United States v. Barnett*, 376 U. S. 681.

The present proceeding was commenced the following week, on April 14, 1964, by a Petition for Discharge from Custody filed in the district court, on the ground that this petitioner had been confined continuously since October 25, 1963 (except from 8 to 18 November, when he had been enlarged on bail), and on the further ground that his sentence, to be confined until such time as he purged himself by answering the questions of the grand jury, was illegal (a) because it was an indefinite punishment for a criminal

contempt, and (b) because it exceeded the constitutionally permissible punishment for such an offense.

The Government's reply admitted that petitioner "was convicted of criminal contempt of court * * * upon trial held without a jury under and pursuant to Section 42(a) of the Federal Rules of Criminal Procedure" (Reply, ¶ 1), that he was confined as alleged "because of his continuing failure and refusal to answer the questions of the Grand Jury, which failure and refusal continues to the present time" (Reply, ¶ 3), and that "petitioner was properly tried under Section 42(a) of the Federal Rules of Criminal Procedure" (Reply, ¶ 6).

The district court treated the petition as a motion under Rule 35, F. R. Crim. P., for the correction of an illegal sentence, and denied it.

The court of appeals affirmed. It distinguished what was said by this Court in *United States v. Barnett*, 376 U. S. 681, 695, note 12, as to the limits of punishment for contempt by summary trial without a jury as applying only to "an unqualified sentence imposed as a punitive sanction" and held that the indeterminate sentence under which this applicant is being held as justified within the terms of Mr. Justice Goldberg's dissenting remarks in *Barnett*, 376 U. S. at 753-754, that "I am not here concerned with, nor do I question, the power of the courts to compel compliance with their lawful orders by the imposition of conditional punishment—commonly referred to as civil contempt."

An application for bail made to the court below at the time of petitioner's appeal was denied by that court on July 14, 1964. An application for bail thereafter made to the Circuit Justice was denied by Mr. Justice Brennan on July 29, 1964.

The grand jury in question will expire on November 1, 1964.

The first order day of the present Term will be October 12, 1964. On that day this petitioner will have been in confinement for 11 months and one week.

REASONS FOR GRANTING THE WRIT.

The judgment below, which approved the imposition in a purely punitive proceeding for criminal contempt of an indefinite sentence that would have been appropriate only in an enforcement proceeding for civil contempt, ignores hitherto well settled datum points to the prejudice of this petitioner. (We only note, what indeed will become apparent from the argument that follows, that at this juncture petitioner does not reassert any contention made here at the last Term; only the legality of his sentence is now in question.)

First. Discussion starts with the three undoubted propositions, every one of them drawn from decisions of this Court.

1. Civil contempt involves enforcement of a judicial order or decree, criminal contempt involves punishment. *United States v. United Mine Workers*, 330 U. S. 258, 295-301 (Point III); *Ex parte Grossman*, 267 U. S. 87; *Michaelson v. United States*, 266 U. S. 42.

2. The sentence imposed in a criminal case must be one for a definite term, unless a statute specifically provides otherwise. E.g., 18 U. S. C. § 4208; District of Columbia Code, § 24-203. Indeed, before Congress authorized suspended sentences, courts of the United States lacked power to suspend the execution of any sentence to imprisonment. *Ex parte United States*, 242 U. S. 27.

3. A punishment summarily imposed by the court in a proceeding for which trial by jury is not authorized, which in this case has now exceeded nine months, transcends constitutional limitations. *United States v. Barnett*, 376 U. S. 681, 695, note 12.

In a summary criminal contempt proceeding based on refusal to answer questions before a Grand Jury even a remedial type of punishment should not be permitted to exceed six months.

Second. Of course a court has power to impose a conditional imprisonment to secure compliance with its orders or decrees. But the district court here undertook to proceed under Rule 42, F. R. Crim. P. That rule has absolutely nothing to do with enforcement; it is purely punitive. Its heading, "Criminal Contempt", accurately characterizes its substantive provisions, which in subpar. (a) say "may be punished", and in subpar. (b) speak of "an order fixing the punishment".

We repeat, those are not provisions creating sanctions for enforcement, nor for purging contempts already committed. The contempt here committed in the presence of the court was the disobedience of an order of the court; that is criminal conduct, declared to be such in 18 U. S. C. § 401(3). Crimes call for punishment; crimes cannot be purged.

Here the district judge's certificate showed on its face, first, that he was dealing with "A criminal contempt * * * committed in the actual presence of the court" which "may be punished summarily", Rule 42(a), and, second, that he was complying with the direction in Rule 42(b) that "Upon a verdict or finding of guilt the court shall enter an order fixing the *punishment*.". We have added the italics to emphasize the impossibility of treating the present proceeding as a civil contempt, as was done by the court below.

Substance of course prevails rather than form; on occasion, as in *United States v. United Mine Workers*, 330 U. S. 258, it may be appropriate to try the civil and the criminal contempts simultaneously; but just as no amount of argument on substance can transform an indictment returned by a grand jury into a complaint filed by the United States Attorney, so the present punitive proceeding under Rule 42, F. R. Crim. P., the "Criminal Contempt" provision, cannot be transformed into an enforcement sanction for civil contempt, which it plainly was not *when* it was instituted, and which the Government in its reply in the district court correctly characterized as a proceeding under

Rule 42 in which petitioner "was convicted of criminal contempt of court" (Reply, ¶ 1). This is not the type of "a civil remedy designed for the benefit of other parties" as, for example, in *United States v. United Mine Workers, supra.*

Third. In view of the short time remaining before this case will become moot by reason of the expiration of the grand jury, petitioner stands ready to expedite the hearing in any way suggested, unless of course in the interim this Court should dispose of the case on the appeal papers.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for the Petitioner.

August, 1963.

APPENDIX A.

OPINION BELOW.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14922

UNITED STATES OF AMERICA

v.

PHILIP CHARLES TESTA,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted June 10, 1964

Before: BIGGS, *Chief Judge*; and HASTIE and GANEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 9, 1964)

PER CURIAM:

We find neither error in law nor abuse of discretion in the district court's denial of the appellant's petition for discharge from custody or for correction of an allegedly illegal sentence.

On October 25, 1963 the district court ordered the appellant committed to jail until he should answer certain questions propounded to him as a witness before a grand jury. He remains confined pursuant to that commitment. The grand jury in question has not been discharged. The appellant still can, as he could at any time since his commitment, purge himself of contempt and secure his release by appearing before the grand jury and answering the questions heretofore propounded to him. However, he persists in his contumacious refusal to obey the district court's lawful command that he testify.

We have already reviewed and affirmed the district court's original order and the consequent commitment. 326 F.2d 730, *cert. denied*, 376 U.S. 931. The only new point raised now is that made on April 6, 1964, by Mr. Justice Clark in *United States v. Barnett*, 376 U.S. 681, when he asserted that "some members of the Court are of the view that, without regard to the seriousness of the offense, punishment [for contempt] by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." p. 695, *footnote* 12.

We think Mr. Justice Clark was speaking about an unqualified sentence imposed as a punitive sanction. In contrast, the present conditional commitment is only a coercive remedial sanction to enforce compliance with a judicial mandate. The appellant's confinement, different from a punitive sentence, will be as brief or as long as he chooses and, in any event, no longer than the availability of the present grand jury makes possible compliance with the court's order. We think that a prisoner who is thus entitled to be released whenever he shall elect to obey a lawful order of the court has not been subjected to such a penalty as was contemplated by Mr. Justice Clark's admonition.

We are reinforced in this view by language in the opinion of Mr. Justice Goldberg, speaking for the three dissenting Justices in the *Barnett* case, who thought that

even a minor criminal penalty should not be imposed except pursuant to a jury trial. Mr. Justice Goldberg was careful to limit this position, saying:

> "I wish to make it clear that I am not here concerned with, nor do I question, the power of the courts to compel compliance with their lawful orders by the imposition of conditional punishment—commonly referred to as civil contempt. In such cases, it may be said that 'the defendant carries the keys to freedom in his willingness to comply with the court's directive . . . .' . . . I am concerned solely with the imposition, without trial by jury, of fixed nontrivial punishments *after* compliance with the court's order has been secured." 376 U.S. at 753-54.

There is no reason to believe that any member of the Court did not subscribe to this limitation.

The appellant also argues that he has been "punished" enough for his contumacity and that his imprisonment is causing his family to suffer. Again, the short answer is that this is a conditional and remedial commitment. Appellant can at any time achieve his own release by testifying before the grand jury. In this connection it is noteworthy that if the appellant now testifies before the grand jury he will be immune from state prosecution as well as federal prosecution as a result of any disclosures he may make. *Murphy v. Waterfront Commission*, No. 138, decided by the Supreme Court June 15, 1964; *Malloy v. Hogan*, No. 110, decided by the Supreme Court June 15, 1964.

The order of the district court will be affirmed.

APPENDIX B.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,922

UNITED STATES OF AMERICA

v.

PHILIP CHARLES TESTA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, and HASTIE and GANEY, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the order filed May 20, 1964 of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

July 9, 1964